

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 19, 2018

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2017-1482-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 80, Contested Case Hearings
Chapter 288, Water Conservation Plans, Drought Contingency Plans,
Guidelines and Requirements
Chapter 295, Water Rights, Procedural
Chapter 297, Water Rights, Substantive
HB 1600 and SB 567 (83rd), HB 1648, HB 3735, SB 864, SB 1430 (85th):
Water Rights – Expedited Amendments, Notice, & Conservation, and PUC
Transfer
Rule Project No. 2017-034-295-OW

Background and reason(s) for the rulemaking:

In 2013, the 83rd Texas Legislature passed House Bill (HB) 1600 by Representative Byron Cook and Senate Bill (SB) 567 by Senators Kirk Watson and Robert Nichols. In 2017, the 85th Texas Legislature passed HB 1648 by Representative Four Price, HB 3735 by Representative James Frank, and SB 864 and SB 1430 by Senator Charles Perry. These bills were all effective on September 1, 2017.

HB 1600 and SB 567 relate to the Public Utility Commission of Texas (PUC) Sunset Legislation, which transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and sewer utilities.

HB 1648 relates to the designation of a water conservation coordinator by a retail public water utility to implement a water conservation plan. HB 1648 adds provisions under the Texas Water Code (TWC), §13.146, for the TCEQ to require retail public utilities that provide potable water to 3,300 or more connections to: (1) designate a person as the water conservation coordinator responsible for implementing the water conservation plan; and (2) identify, in writing, the water conservation coordinator to the executive administrator of the Texas Water Development Board (Board). In addition, TCEQ would have to take appropriate enforcement action when notified by the Board that an entity has not complied with the requirements imposed by HB 1648.

HB 3735 relates to an application for a new or amended water right submitted to the TCEQ. HB 3735 amends TWC, §11.125, to change specific map requirements in subsection (a) with a more general requirement to submit maps in the form prescribed by the commission and removes additional specific map requirements by repealing subsections (b) and (c). HB 3735 also adds new TWC, §11.134(b-1), which codifies the commission's practice to limit the commission's consideration of the public welfare in water rights applications to "those factors that are within the commission's jurisdiction and expertise." Additionally, the Enrolled version of HB 3735 also includes the provisions

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from Filed SB 1430 described below that were added to HB 3735 in a Senate Committee Substitute.

SB 864 relates to the procedure for obtaining a right to use state water if the applicant proposes an alternative source of water that is not state water. SB 864 amends notice requirements relating to alternate sources of water used in water rights applications. Amended TWC, §11.132(c) and §11.143(e), require that the notice of an application identify any proposed alternative sources of water. Amended TWC, §11.132(d) and §11.143(f), require that the commission provide mailed notice of an application to any groundwater conservation district (GCD) with jurisdiction over groundwater production in an area from which the applicant proposes to use groundwater as an alternative source. Amended TWC, §11.143(f), requires published notice of a hearing in a newspaper of general circulation in each county in which a GCD is located for applications to use an exempt reservoir to convey groundwater under the jurisdiction of a GCD.

SB 1430 relates to a requirement that the TCEQ provide an expedited procedure for acting on certain applications for an amendment to a water right by certain applicants that use desalinated seawater. New TWC, §11.122(b-1), provides that an applicant has a right, under certain circumstances, to expedited consideration of an application to change the diversion point for their existing non-saline surface water right when the applicant begins using desalinated seawater. New TWC, §11.122(b-2), further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of other applications that are not subject to that subsection. Finally, for a contested case hearing relating to an application under new TWC, §11.122(b-1), newly amended Texas Government Code, §2003.047(e-3) and (e-6), require the State Office of Administrative Hearings Administrative Law Judge (ALJ) to complete a proceeding and provide a proposal for decision to the commission not later than the 270th day after the date the matter was referred for a hearing.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

Implementation of HB 1600 and SB 567

The rulemaking amends §80.4 by removing §80.4(c)(15), authorizing judges to issue interim rate orders under TWC, Chapter 13. This function transferred from the commission to the PUC on September 1, 2014.

Implementation of HB 1648

The rulemaking amends §288.1 and §288.30, to implement the directive in TWC, §13.146, related to the requirements for retail public utilities that provide potable water to 3,300 or more connections to: (1) designate a person as the water conservation coordinator responsible for implementing the water conservation plan; and, (2) identify, in writing, the water conservation coordinator to the executive administrator of the Board.

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Implementation of HB 3735

The rulemaking implements amended TWC, §11.125, by repealing §§295.121 - 295.126 and proposing new §295.121 and §295.122 which replace specific map requirements with a more general requirement to submit maps in the form prescribed by the commission. The rulemaking implements amended TWC, §11.134, by amending §297.46 to state that for purposes of public welfare findings made under this section, the commission may only consider factors that are within the commission's jurisdiction and expertise as established in TWC, Chapter 11.

Implementation of SB 864

The rulemaking amends §§295.151 - 295.153 to implement SB 864. The rulemaking implements TWC, §11.132(c) and §11.143(e), by adding §295.151(b)(9) to require any notice of a water right application to identify any proposed alternative source of water, other than state water, identified by the applicant and renumbering the remaining paragraphs in the subsection to accommodate the new requirement. The rulemaking implements TWC, §11.143(f), by adding §295.152(b) to require published notice of a hearing in a newspaper of general circulation in each county in which a GCD is located for applications to use an exempt reservoir to convey groundwater under the jurisdiction of a GCD and re-lettering existing subsection (b) to subsection (c). The rulemaking also amends §295.151(a) to specify that the subsection applies to an application for a permit pursuant to TWC, §11.121, or for an amendment to a TWC, §11.121, permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and §295.158(b). Finally, the rulemaking implements TWC, §11.132(d) and §11.143(f), by adding §295.153(b)(3) and (c)(2) that each require that the commission provide mailed notice of an application to any GCD with jurisdiction over groundwater production in an area from which the applicant proposes to use groundwater as an alternative source. The rulemaking also renumbers existing paragraphs in subsections (b) and (c) to accommodate the new requirement.

Implementation of SB1430 and HB 3735

The rulemaking implements new TWC, §11.122(b-1), by proposing new §295.73 which provides certain applications with an expedited process (prioritized technical review) to change the diversion point for their existing non-saline surface water right when the applicant begins using desalinated seawater. The rulemaking also implements related amendments to Texas Government Code, §2003.047(e-3) and (e-6), by amending §80.252 to require the commission to set a deadline of no more than 270 days for contested case hearings on the §295.73 expedited amendment applications. The rulemaking also amends §80.4 to allow the ALJ who hears the contested case on a §295.73 expedited amendment to extend the deadline set for the hearing if the judge determines that failure to grant an extension would unduly deprive a party of due process or another constitutional right; or by agreement of the parties with approval of the judge. The rulemaking also clarifies that a political subdivision has the same constitutional rights as an individual for purposes of §80.4.

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B.) Scope required by federal regulations or state statutes:

There are no requirements in this rulemaking associated with federal regulations. The proposed rulemaking would implement HB 1600 and SB 567 by transferring the functions relating to the economic regulation of water and sewer utilities from the TCEQ to the PUC; HB 1648 by amending requirements relating to certain retail public utilities and their designation of a water conservation coordinator; HB 3735 by amending specific map requirements and codifying the commission's practice regarding consideration of the public welfare in water rights applications; SB 864 by amending notice requirements relating to alternate sources of water used in water rights applications; and SB 1430 by amending provisions relating to applications to change the diversion point for existing non-saline surface water rights when the applicant begins using desalinated seawater.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

Texas Government Code, §2003.047, Hearings for Texas Commission on Environmental Quality

TWC, §5.013, General Jurisdiction of Commission

TWC, §5.102, General Powers

TWC, §5.103, Rules

TWC, §5.105 General Policy

TWC, §11.122, Amendments to Water Rights Required

TWC, §11.125, Map or Plat

TWC, §11.132, Notice

TWC, §11.134, Action on Application

TWC, §11.135, Issuance of Permit

TWC, §§11.1405, Desalination of Seawater for the Use of Industrial Purposes

TWC, §11.143, Use of Water from Exempt Dam or Reservoir for Nonexempt Purposes

TWC, §13.146, Water Conservation Plan

TWC, Chapter 18, Marine Seawater Desalination Projects

Effect on the:

A.) Regulated community:

HB 1600 and SB 567

Beginning September 1, 2014, the regulated community began working with the PUC involving the economic regulation of water and sewer utilities.

HB 1648

Agency implementation activities will affect the regulated community (retail public water suppliers with greater than 3,300 or more connections). The statute requires retail public utilities that provide potable water to 3,300 or more connections to designate a person as the water conservation coordinator responsible for implementing the water conservation plan and identify, in writing, the water conservation coordinator to the executive

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administrator for the Board. The Enrolled version of the Legislative Budget Board's Fiscal Note for HB 1648 did not anticipate any significant fiscal impact to the state. Any fiscal impact cannot be quantified because the agency does not have information regarding what entities currently have a water conservation coordinator, what entities will designate existing staff as a coordinator, or what entities will employ a new water conservation coordinator.

SB 1430 and HB 3735

Agency implementation will affect the regulated community because the new prioritization of these types of applications has the potential to affect existing water rights as well as applicants for amendments to move diversion points that are administratively complete before applications submitted under §295.73 relating to expedited process. There may be cost savings for applicants eligible for the expedited application and hearing process.

SB 864

Some applicants will incur additional notice fees.

B.) Public:

Agency implementation activities for HB 1600 and SB 567 (2013) and HB 1648, HB 3735, SB 864, and SB 1430 (2017) will not affect the public.

C.) Agency programs:

Agency implementation activities for HB 1600 and SB 567 (2013) and HB 1648, HB 3735, SB 864, and SB 1430 (2017) will have minimal impact on agency programs. The Water Availability Division will implement the rules into its existing procedures for processing water rights.

Stakeholder meetings:

An informal stakeholder meeting was held on September 11, 2017, in Austin, Texas. TCEQ staff presented general information about the proposed rulemaking and solicited stakeholder comments regarding the implementation of HB 1648, HB 3735, SB 864, and SB 1430. The meeting was attended by 10 stakeholders representing a broad spectrum of interests affected by this rulemaking and across the state. The comment period related to this stakeholder meeting remained open until September 26, 2017, and the commission received comment letters from the City of Dallas, Law Offices of Glenn Jarvis, Lloyd Gosselink Rochelle & Townsend, P.C., National Wildlife Federation and Sierra Club, Lone Star Chapter, San Antonio Water System, Texas Water Conservation Association, and Ward Timber LTD. The executive director based these proposed rules on consideration of the legislation and consideration of comments received from the stakeholders.

A rule public hearing will be held during the comment period in Austin.

Potential controversial concerns and legislative interest:

There are no controversial concerns or legislative interest related to TCEQ implementation activities for these statutes.

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Will this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

The consequences of failure to go forward with this rulemaking is that the commission will not fully implement the new requirements in the legislation described in this executive summary. The bills implemented in this rulemaking did not provide alternative regulatory methods.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: February 7, 2018

Anticipated *Texas Register* publication date: February 23, 2018

Anticipated public hearing date (if any): March 20, 2108

Anticipated public comment period: February 23, 2018 – March 26, 2018

Anticipated adoption date: July 2018

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Attachments:

HB 1600, 83rd Texas Legislature (2013)

SB 567, 83rd Texas Legislature (2013)

HB 1648, 85th Texas Legislature (2017)

HB 3735, 85th Texas Legislature (2017)

SB 864, 85th Texas Legislature (2017)

SB 1430, 85th Texas Legislature (2017)

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